

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petitions for Declaratory Ruling Regarding)	MB Docket No. 09-13
Public, Educational and Governmental)	
Programming)	
)	
Alliance for Community Media <i>et al.</i>)	CSR-8126
)	
City of Lansing, Michigan)	CSR-8127
)	
City of Dearborn, Michigan <i>et al.</i>)	CSR-8128
)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORP.

Michael Olsen
Paul Jamieson
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2583

Christopher J. Harvie
Stefanie A. Zalewski
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

April 1, 2009

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
I. THE COMMENTS FAIL TO DEMONSTRATE THAT DIGITIZING PEG IS UNLAWFUL	4
II. CABLEVISION ALLOWED EVERY INTERESTED ANALOG HOUSEHOLD AN OPPORTUNITY TO CONTINUE TO VIEW PEG CHANNELS AT NO ADDITIONAL COST	12
CONCLUSION.....	14

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petitions for Declaratory Ruling Regarding)	MB Docket No. 09-13
Public, Educational and Governmental)	
Programming)	
)	
Alliance for Community Media <i>et al.</i>)	CSR-8126
)	
City of Lansing, Michigan)	CSR-8127
)	
City of Dearborn, Michigan <i>et al.</i>)	CSR-8128
)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORP.

Cablevision Systems Corp. (“Cablevision” or the “Company”) submits the following reply comments in the above-captioned proceedings.

INTRODUCTION AND SUMMARY

Cablevision undertook the digitization of its public, educational and governmental (“PEG”) access channels in September and October of 2008 consistent with the Company’s substantial and longstanding commitment to PEG support. First, Cablevision delayed this transition until an overwhelming majority of its customers were already digital, and thereby largely unaffected by the transition. Second, Cablevision provided advance notice in several forms to all customers and local franchising authorities of the transition. Third, Cablevision made an unprecedented offer to any analog subscriber: a digital set top box, to view PEG channels, for free, for life. Cablevision left the free box offer open for over five months. Every customer that wanted to view PEG, then, was

able to and has taken advantage of the offer. Everything about Cablevision's transition of PEG channels to digital was focused on balancing the interests of our digital customers, analog customers, and long-standing support for PEG access.

Cablevision's digitization of PEG channels was reasonable in light of the law and the composition of its subscriber base. In the fall of 2008, applicable law clearly permitted cable operators to carry both analog and digital channels on the Basic tier. In fact, Cablevision already carried several digital broadcast channels as part of the Basic tier. No Commission rule restricted PEG digitization, and the Cable Act barred State and local governments from regulating transmission of cable channels in digital format. Further, the Commission itself was encouraging cable operators to transition from analog to digital technology. Over 90% of Cablevision's customers were already subscribing to digital service, and a steadily growing number of subscribers had been – and continue to be – acquiring new QAM-equipped digital television sets that enable them to view PEG and other digital channels carried on the Basic tier without the need for any additional equipment. The small percentage of Cablevision customers that relied exclusively on analog services were offered a digital set top box to view the PEG channels free, for life.

There is no dispute in this proceeding that a cable operator may digitize PEG channels as part of a plan to convert all its analog services to digital. And it is plain from the Commission's orders that operators are permitted to do so.^{1/} Indeed, even some

^{1/} See, e.g., *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, Second Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8803, ¶ 18 (2007) (the FCC is "cognizant that the ultimate goal of Congress is that every customer should enjoy the benefits of the digital transition. That is, our policies should advance the goal of transitioning all consumers--including cable consumers--to digital"); *Millennium Telecom, LLC d/b/a OneSource Communications Request for Waiver Section 76.1204(a)(1) of the Commission's Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 22 FCC Rcd 8567, ¶ 10 (2007) (a cable operator's "transition

supporters of Petitioners acknowledge the advantages and inevitability of cable operators digitizing analog channels.^{2/}

The Dearborn petitioners' argument, then, is that while federal law permits an operator to digitize all at once, it *prohibits* operators from accommodating analog households with a gradual migration of channels to digital, unless PEG channels are among the final group of channels to be migrated. As a practical matter, this "all or nothing" requirement would be both wasteful and pernicious for consumers. It would stall the migration to digital by commandeering a substantial portion of bandwidth for continued analog simulcast of PEG channels – a highly inefficient use of spectrum, especially in systems like Cablevision's where only a small fraction of customers still subscribe to analog programming. Alternatively, where PEG digitization is already complete, the "all or nothing" approach would force an abrupt, immediate termination of all analog services in order to meet the petitioners' demand for PEG-equity, regardless of the cost or consequences to consumers or operators. Nothing in the Cable Act requires such a result. Precluding cable operators from digitizing PEG channels unless and until they discontinue offering all other analog services would lead to service disruptions and additional costs for analog-only households that are neither necessary nor warranted, and interfere with ongoing efforts by cable operators to transition their customers to digital

to an all-digital network . . . would produce clear, nonspeculative public interest benefits, particularly when considered in the context of the Commission's goal of promoting the broadcast television digital transition"); *Bend Cable Communications, LLC d/b/a Bend Broadband Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 22 FCC Rcd 209, ¶ 24 (2007) (waiving the application of the FCC rule banning converter boxes with integrated security for cable operator committing to implementation of an all-digital network).

^{2/} See Free Press at 13

television technology in the most seamless, cost-effective and subscriber-friendly manner possible.

I. THE COMMENTS FAIL TO DEMONSTRATE THAT DIGITIZING PEG IS UNLAWFUL

No commenter in this proceeding challenges the fundamental proposition that a cable operator is free to digitize PEG channels if it converts to an all-digital system.^{3/} Commenters supporting the Dearborn petition, however, contend that a cable operator cannot digitize PEG channels unless and until it has converted all other analog channels it provides to digital.^{4/} This position is wrong on both policy and legal grounds.

As a policy matter, a rule precluding PEG digitization until all other channels on a system are digitized would instead hasten the elimination of any analog offerings by cable operators. For example, Cablevision has already digitized its PEG channels, has digital penetration that exceeds 90% – the highest of any cable operator in the country – and, in another step toward converting to an all-digital system, has announced its intention to cease selling analog to new subscribers in 2010.^{5/} Were the Commission to decide that cable operators could only digitize PEG channels if all other channels on the system also were provided in digital, the only practical course for the Company would be to accelerate its plans to eliminate the limited analog offering it now provides as an accommodation to its customers with analog television sets. Removing *all* other analog services would not aid the distribution or viewing of PEG channels, which would remain digital and still require some form of digital reception capability in order to be viewed.

^{3/} See *id.*

^{4/} See, e.g., City of Lansing at 7-8; Free Press at 11-12.

^{5/} “Moving To An All-Digital Future, Cablevision Next Year Will Sell Expanded Basic Only In Digital To New Customers,” Press Release, March 12, 2009.

The rule sought by Petitioners – precluding digitization of PEG until a system has converted to all-digital – would be much more expensive for both consumers and cable operators than allowing cable operators to transition their customers to digital more gradually. For example, Cablevision’s accommodative approach to digitization meets two competing goals: it frees up bandwidth resources to meet the demand of its customers (90% of whom are digital subscribers) for more broadband capacity, on-demand programming and HD service, yet permits customers to view a modest package of analog channels on sets without digital tuners or set top boxes. By making available PEG boxes for free to analog customers, Cablevision ensured that all analog households interested in viewing PEG could do so at no additional costs, thereby further accommodating the interests of analog households while moving forward with the conversion to digital.

On the other hand, an “all or nothing” rule, as advocated by supporters of the Dearborn petition, would prohibit such accommodation. It would force cable operators to either waste valuable spectrum by transmitting analog simulcasts of PEG channels – thereby foreclosing the ability to use that bandwidth to provide the HD and on-demand offerings and faster Internet speeds demanded by consumers and provided by competitors. Or, more likely, for cable operators such as Cablevision that have already digitized PEG channels, the “all or nothing” approach would require the Company to transition immediately all programming to digital, thereby requiring every Cablevision customer to purchase a set top converter for every analog set in their home. This would require the Company to spend hundreds of millions of dollars on set top boxes and consumers to spend hundreds of dollars more each year to lease these boxes. Rather than

promote consumer interests, the costs and burdens of the petitioners' "all or nothing" policy will simply harm those customers who today are happy to get *both* analog programming and PEG channels on a free set top box – as well as those customers that declined the free PEG box offer but still value the convenience of being able to view a small package of analog channels on their add sets.

Legally, the position of the Dearborn petitioners' position is unfounded. The Cable Act does not restrict cable operators from digitizing PEG until all analog services are digitized.

First, the viewability requirement of Section 614(b)(7) reaches only broadcast channels, and does not apply to PEG channels. In its *Viewability Order*, the Commission relied upon the viewability provisions of section 614 to require the analog carriage of broadcast, but *did not* compel the analog carriage of PEG channels.^{6/} Nor can the viewability requirement be "extended" to PEG through 623 based on the social value of PEG programming. Regardless of the value or quality of PEG channels, Congress simply did not include PEG in the viewability requirement, and implying such a requirement is at odds with the law.^{7/} PEG channel carriage requirements are governed solely by Section 623(b)(7) and there is no viewability obligation contained in that provision.^{8/} As Comcast notes:

Congress did not give PEG channels the right to be on any particular channel location, nor did it impose an obligation on cable operators to ensure that PEG channels are "viewable . . . on all television receivers which are connected to a cable system." The statute does not permit the Commission to elevate PEG

^{6/} See *Carriage of Digital Television Broadcast Signals*, Third Report and Order, 22 FCC Rcd 21064, ¶¶ 15-16 (2007) ("*Viewability Order*").

^{7/} See Cablevision Initial Comments ("*Cablevision*") at 16-17.

^{8/} NCTA at 10.

channels to the status of broadcast channels nor confer rights on them which Congress did not intend.^{9/}

Second, the Cable Act expressly contemplates that some or all of the programming in the Basic tier may be viewed only with additional equipment, including converter boxes. Some commenters have argued, alternatively, that PEG cannot be digitized because doing so may require some customers to purchase or lease converter boxes, and that such a result is impermissible.^{10/} This position is at odds with the statute. The Act presumes that converter boxes will be used by Basic tier subscribers and authorizes operators to charge for those boxes.^{11/} Further, Section 614 of the Cable Act specifically contemplates that there will be instances in which broadcast signals carried on the Basic tier cannot be viewed without a converter.^{12/} There is simply no legal support for a Commission ruling that all Basic tier subscribers must be able to view PEG channels on all TV sets without having to pay for additional equipment.

Third, section 611 – which allows local franchising authorities to request PEG channel capacity in a franchise – does not empower local franchising authorities to prescribe the format or technology used to transmit those channels.^{13/} As NCTA points out, “far from requiring – or authorizing franchising authorities to require – that access

^{9/} Comcast at 15-16.

^{10/} See, e.g., St. Petersburg, FL at 8; Montgomery County, MD at 7-9; Alliance for Community Media at 2-3, 5-7.

^{11/} 47 U.S.C. § 543(b)(3)(A) (emphasis added).

^{12/} 47 U.S.C. § 534(b)(7) (specifying cable operator’s obligations in circumstances in which broadcast stations “carried on the cable system” cannot be viewed without a converter); see also *WLIG-TV, Inc. v. Cablevision Systems Corporation*; *Request for Carriage*, 74 RR2d 208 (1993) (stating that “cable operators are not required to provide converter boxes to their subscribers, or to provide all cable connections for their subscribers, but they must notify all their subscribers of the broadcast stations they cannot receive without a converter box”).

^{13/} See Montgomery County, MD at 9-11; NATOA at 13; Alliance for Community Media at 6-7.

channels be provided in analog format, Congress, in Section 624, specifically forbade states and franchising authorities from ‘prohibit[ing], condition[ing], or restrict[ing] a cable system’s use of any type of subscriber equipment or *any transmission technology*.’”^{14/} Notably, no commenter supporting the Dearborn petition makes any effort to reconcile the assertion of local authority to regulate PEG digitization with the clear proscription against local regulation of transmission format in Section 624(e).

Fourth, Dearborn incorrectly argues that PEG digitization constitutes an improper evasion of the rate regulation rules in circumstances where analog Basic tier subscribers cannot view channels embedded in the BST rate without a converter.^{15/} The Commission, however, when faced previously with this same fact situation, never suggested that because some Basic tier channels could be viewed only with a converter box the operator had somehow removed them from the Basic tier or otherwise violated the rate regulation rules.^{16/} To the contrary, the Commission expressly rejected a local franchising authority’s conclusion that the two Basic tier channels that could only be viewed with a converter could not be included in the computation of the BST rate.^{17/}

The cases cited by Dearborn in support of its argument that digitizing PEG channels yields an implicit rate increase prohibited by the evasion provision are

^{14/} NCTA at 10-11 (emphasis in original).

^{15/} Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in *City of Dearborn et. al. v. Comcast of Michigan III, Inc. et. al.* of the City of Dearborn, Michigan; The Charter Township of Meridian, Michigan; The Charter Township of Bloomfield, Michigan; and The City of Warren, Michigan, CSR 8128, (filed Dec. 9, 2008) (“Dearborn Petition”), at 9-12.

^{16/} *TCI of Southeast Mississippi*, 10 FCC Rcd 8728, ¶¶ 11-12, 15 (1995) (rejecting LFA’s attempt to reduce operator’s per-channel rate for Basic service by excluding C-SPAN and C-SPAN II due to fact that those channels were not available to BST subscribers without the use of a converter).

^{17/} *See id.*

inapposite.^{18/} For example, the *Comcast of Dallas* case addressed the ability of an operator to recover certain items in its installation costs that were not initially “unbundled” from its service costs when rate regulation took effect in 1993; there is absolutely no suggestion in that case that converter rates and Basic tier rates are “so intertwined” that the two must be considered as a single rate. Indeed, such a requirement directly contravenes the Commission’s repeated directive to unbundled and separate equipment costs from converter costs.^{19/}

Fifth, claims that PEG digitization discriminates against analog subscribers because they must obtain some form of digital reception capability are likewise unavailing. As NCTA points out, during the 1990s, many cable customers owned television sets that could not tune some or all UHF channels.^{20/} While such customers needed to obtain a converter box to view any Basic tier programming located above channel 13 or channel 36, the Commission never suggested that such customers were subject to unlawful discrimination. Likewise, early in the digital transition, the Commission encouraged cable operators to carry both analog and digital broadcast channels on the Basic tier.^{21/} Moreover, since 2001, the Commission has specifically allowed digital-only must-carry stations to opt against being downconverted in analog,^{22/}

^{18/} Dearborn Petition at 11.

^{19/} See Cablevision at 15; Comcast at 13. The other case cited by Dearborn, *TCI Cablevision of Oregon, d/b/a/ TCI of Tulatin Valley*, 14 FCC Rcd 17685 (1999), addressed the recoverability of “tap audit costs” in an operator’s installation rate. Nothing in that decision offers any support for the proposition that digitizing PEG channels constitutes an undertaking effectuated “solely” for the benefit of the cable operator, or that charging subscribers for converter boxes used to view digital channels on the BST constitutes an evasion of the rate rules.

^{20/} NCTA at 12.

^{21/} See *id.* at 4; Cablevision at 8-9.

^{22/} See, e.g., *WHDT-DT, Channel 59, Stuart, Florida Petition for Declaratory Ruling that Digital Broadcast Stations Have Mandatory Carriage Rights*, 16 FCC Rcd 2692, ¶ 14 (2001).

even though that means the station would not be viewed by analog-only subscribers. Today, Cablevision carries several stations in its Basic tier in digital-only format, in addition to PEG. In each of these instances, analog television customers may need additional equipment in order to view channels carried on the Basic tier; but the Commission never characterized those circumstances as discriminatory or otherwise unlawful.

Supporters of the Dearborn petition argue that the Cable Act's legislative history supports their view that digitizing PEG channels while continuing to carry analog services constitutes impermissible discrimination. The cited passages, however, offer no support for that position. The term "nondiscriminatory" is mentioned in the legislative history of the 1992 Act in connection with a description of the manner in which PEG access channel capacity is made available for use by residents of a local community interested in producing and airing programming.^{23/} But there is nothing in either the Cable Act or its legislative history to suggest that providing PEG channels in digital format while continuing to offer analog services constitutes an unlawful discrimination.

Sixth, even if Section 623 could be read to restrict digitizing PEG channels, no commenter supporting the Dearborn petition has offered any legal argument that can surmount the clear directive from the courts, the Commission and the Cable Act that the PEG tiering restrictions in Section 623(b)(7) are not applicable to cable operators facing effective competition.^{24/} Dearborn suggests that the D.C. Circuit, in *Time Warner v. FCC*,^{25/} held only that that tier-buy through provision of Section 623(b)(8) sunsets upon a

^{23/} H.R. Rep. No. 102-628 (1992) at 85.

^{24/} See Cablevision at 9-10; Comcast at 26-27; NCTA at 6-7; Bright House Networks at 3-4.

^{25/} *Time Warner, et. al. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995).

finding of effective competition.^{26/} But that argument is belied by the language of the decision stating that Section 623(b)(7) “applies only to regulated systems” and “cannot apply to systems that face effective competition.”^{27/} Further, the most recent Federal court to address this issue concluded that that “under the plain terms of the statute,” the Federal requirement to place PEG channels on the Basic tier of service does not apply where a cable operator faces effective competition.^{28/} The record in this proceeding offers no basis for overturning prior judicial and Commission rulings that cable operators subject to effective competition are not subject to the PEG tiering requirements of Section 623(b)(7).

Last, Cablevision and other operators that have already implemented PEG digitization did so in reliance upon a regulatory framework that did not prohibit or condition such action. Accordingly, to the extent that, in response to this proceeding, the Commission contemplates imposing restrictions on PEG digitization, such restrictions should only be applied prospectively, in accordance with the policy against retroactive rulemaking.^{29/}

^{26/} Dearborn Petition at 16.

^{27/} *Time Warner*, 56 F.3d at 192.

^{28/} See *City of St. Petersburg Florida v. Bright House Networks, LLC*, Case Nos. 8:07-cv-02105-T-24-MSS, 8:07-cv-02106-T-23-TBM., 2008 WL 5231861, at 5 (M.D. Fla. 2008)

^{29/} See, e.g., *Heckler v. Community Health Services of Crawford County, Inc.* 467 U.S. 51, 60 n.12 (1984) (“an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests”); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring) (“A rule that has unreasonable secondary retroactivity -- for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule -- may for that reason be ‘arbitrary’ or ‘capricious’ . . . and thus invalid”).

II. CABLEVISION ALLOWED EVERY INTERESTED ANALOG HOUSEHOLD AN OPPORTUNITY TO CONTINUE TO VIEW PEG CHANNELS AT NO ADDITIONAL COST

Cablevision took extraordinary measures to mitigate any adverse effects of PEG digitization on its customers. Over 90% of Cablevision's subscriber households were already digital customers, and those homes continued to be able to view PEG channels without interruption when Cablevision digitized the PEG channels in the fall of 2008. For the small fraction of Cablevision subscribers that continued to be wholly dependent on analog television, Cablevision sought to make the transition to digitized PEG channels as seamless as possible by offering those households a free converter box for life.

Some commenters have complained that Cablevision's free converter box offer was not adequately publicized, was too short in duration, and should have encompassed all television sets of analog subscribers.^{30/} Cablevision, however, gave written notice of the PEG digitization initiative to all households last August and expressly informed analog-only households of an opportunity to continue to receive PEG channels without additional cost. Customers were able to take advantage of this offer simply by calling a telephone number provided in the notice. Those that did so were offered a free digital set-top box capable of receiving digital PEG channels for their house at no charge, which they could keep for as long as they continued to remain Cablevision subscribers at the same level of service. Over 8000 analog customers took advantage of Cablevision's free box offer, thereby belying assertions that subscribers were not made aware of it. The offer remained open for nearly five months, after Cablevision voluntarily extended its duration. Very few customers followed up in November or December to receive free

^{30/} City of White Plains and Town/Village of Harrison, New York at 4, 7; Town of Riverhead at 1.

boxes to view digital PEG services. Further, since the expiration of the offer, the Company has received no indication that any subscriber who wanted to obtain a free box was somehow prevented from doing so due to issues with notice or the duration of the offer. Accordingly, there is no reason to believe that any significant number – or indeed any number – of customers who want or need digital boxes to continue to view PEG channels did not respond to Cablevision’s offer and receive their free boxes. While thousands of customers accepted the offer, the number of inquiries about the offer had fallen to nearly zero weeks before it ended. Ultimately, only a relatively small number of customers seemed interested – less than 5% of analog customers company-wide.

Some commenters have argued that Cablevision did not go far enough and that it should have provided a free converter box for every analog television set served by the Company – including analog additional outlet sets located in the homes of customers that subscribe to digital service (and therefore can view PEG channels).^{31/} Such a step would be both prohibitively expensive and contrary to law. The Commission itself has emphasized that operators converting to all-digital systems are under no obligation to give away converters to subscribers that retain analog television sets.^{32/}

Forcing cable operators that digitize PEG channels to either discontinue all analog services or provide free boxes for every analog set still connected, harms, rather than promotes, consumer interests. Either subscribers would be deprived of all programming for their analog sets (because cable operators would forego a gradual transition to all-digital) or they would be denied the additional services and capabilities made possible via

^{31/} BPU at 4 (“neither Cablevision nor Comcast have committed to providing an indefinite, no-cost solution to allow all customers to view PEG access programming on all cable-ready televisions”); White Plains/Harrison at 5.

digitization. It makes no sense to countenance such a policy outcome simply to avoid a circumstance in which digital customers wishing to watch PEG channels must walk to the room in their house that features a television set with digital reception capability.

CONCLUSION

For the reasons provided above and in Cablevision's initial comments, the Commission should make clear that digitizing PEG channels does not violate the Cable Act or the Commission's rules; reiterate its prior guidance that the requirements of Section 623(b)(7) do not apply where an operator faces effective competition; and affirm that franchising authorities lack the authority to condition or restrict an operator's digitization of its PEG offerings.

Respectfully submitted,

Michael Olsen
Paul Jamieson
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2583

/s/

Christopher J. Harvie
Stefanie A. Zalewski
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

April 1, 2009

^{32/} See *Viewability Order* ¶ 42 n.141.